

**BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
OF THE STATE OF CALIFORNIA**

AB-9001

File: 20-215007 Reg: 08068468

7-ELEVEN, INC., MICHA SHIM, and WON P. SHIM,
dba 7-Eleven 2173 18821
11079 West Olympic Boulevard, Los Angeles, CA 90064,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rudolfo Echeverria

Appeals Board Hearing: December 2, 2010
Los Angeles

FEBRUARY 9, 2011

7-Eleven, Inc., Micha Shim, and Won P. Shim, doing business as 7-Eleven 2173 18821 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 12 days for their clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Micha Shim, and Won P. Shim, appearing through their counsel, Ralph Barat Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

¹The decision of the Department, dated January 29, 2009, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 1, 1988. On April 21, 2008, the Department filed an accusation against appellants charging that, on February 17, 2008, appellants' clerk, Kyaw Lwin (the clerk), sold an alcoholic beverage to 18-year-old Daniel Benitez. Although not noted in the accusation, Benitez was working as a minor decoy for the Los Angeles Police Department (LAPD) at the time.

At the administrative hearing held on August 14, 2008, documentary evidence was received and testimony concerning the sale was presented by Benitez (the decoy) and by LAPD officer Mark Carvonell. At a second day of the hearing, held on December 2, 2008, testimony concerning the sale was presented by LAPD officer Manuel Armendariz. Steven Shim, the son of two of the licensees, also testified on the second day, regarding employee training.

The testimony established that the decoy entered the premises only after one officer (Armendariz) entered and gave a nod to indicate that the decoy should enter. The decoy selected a 6-pack of beer from the cooler, and then walked to the check-out area. A second officer (Carvonell) stood in line behind the decoy while he purchased the beer. The clerk requested the decoy's identification, and he gave the clerk his valid California driver's license. The clerk looked at the license for several seconds, handed it back to the decoy, and completed the sale.

The Department's decision determined that the violation charged was proved and no defense to the charge was established.

Appellants then filed a timely appeal contending: (1) Rule 141(a)² was violated,

²References to rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

and (2) the decision failed to consider mitigating factors in determining the penalty.

DISCUSSION

I

Appellants contend that Rule 141(a) was violated because, they allege, a reasonable person would have believed that the plainclothes officers, both of whom were in their late 30's, were somehow associated with the decoy - thereby making the decoy appear older, and possibly of age.

Rule 141(a) provides:

(a) A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages to apprehend licensees, or employees or agents of licensees who sell alcoholic beverages to minors (persons under the age of 21) and to reduce sales of alcoholic beverages to minors *in a fashion that promotes fairness*. [Emphasis added.]

Appellants maintain that the facts in this case indicate unfairness, in that the decoy appeared to be “accompanied” by the plainclothes officers, thus making the decoy appear older than his true age.

Appellants support their contention by citing an Appeals Board decision in which the particular facts involved dictated the results. This case is inapposite. In *Hurtado* (2000) AB-7246, the 27-year-old undercover police officer shared a table with the decoy and both the officer and the decoy ordered beers. Here, by contrast, Officer Armendariz entered the premises prior to the decoy, and gave a head nod to indicate that the decoy operation should go forward. There was no evidence presented that the clerk observed this nod, or in any way believed that the officer and decoy were associated with one another. Officer Carvonell stood in line behind the decoy and observed the transaction, but there was no evidence that the clerk believed that he was

with the decoy.

The evidence did not establish that either officer "accompanied" the decoy in such a way that he and the decoy would appear to be "a couple". The clerk did not testify, so even if appellants' argument had been established, the effect this would have had on the clerk's perception would be mere speculation.

As the Board has so often said, it will not second-guess the factual determination by the administrative law judge (ALJ) concerning the appearance of the decoy unless the appellant can demonstrate an abuse of discretion. The ALJ determined that the decoy's appearance complied with rule 141(b)(2) (Det. of Issues II). He made this determination after observing the decoy as he testified, and having been made aware of the matters relied upon by appellants to show that the decoy would have appeared to be older than his true age. Appellants have not presented any convincing argument that the ALJ abused his discretion in making this determination.

II

Appellants contend secondly that the Department's decision fails to consider evidence of mitigation in determining the penalty.

Department Rule 144 (4 Code Cal. Regs., §144), which sets forth the Department's penalty guidelines, provides that higher or lower penalties from the schedule may be recommended based on the facts of individual cases where generally supported by aggravating or mitigating circumstances. Mitigating factors may include, but are not limited to, the length of licensure without prior discipline or problems, positive action by the licensee to correct the problem, documented training of licensee and employees, and cooperation by the licensee in the investigation.

Appellants' brief (at page 7) summarizes the evidence they contend was ignored:

- (1) Appellants require that all of their employees undergo a computer-based training program entitled "Coming of Age",
- (2) Appellants regularly reminded all staff of the laws, rules, and regulations of selling alcoholic beverages in California,
- (3) Appellants removed the override button from the cash register after this incident so that clerks will have to enter a date of birth in the future,
- (4) Appellants employed, at their own expense, a secret shopper program, [and]
- (5) The license in question had approximately six years of discipline free licensure.

Appellants did, in fact, receive a mitigated penalty - a 12-day suspension, rather than the 15-day suspension recommended by the Department.

We are not prepared to hold that an ALJ must articulate as findings of fact all of the individual elements of mitigation put forth by a licensee. Rule 144 itself addresses the discretion necessarily involved in an ALJ's recognition of aggravating or mitigating evidence:

Penalty Policy Guidelines:

The California Constitution authorizes the Department, in its discretion[,] to suspend or revoke any license to sell alcoholic beverages if it shall determine for good cause that the continuance of such license would be contrary to the public welfare or morals. The Department may use a range of progressive and proportional penalties. This range will typically extend from Letters of Warning to Revocation. These guidelines contain a schedule of penalties that the Department usually imposes for the first offense of the law listed (except as otherwise indicated). These guidelines are not intended to be an exhaustive, comprehensive or complete list of all bases upon which disciplinary action may be taken against a license or licensee; nor are these guidelines intended to preclude, prevent, or impede the seeking, recommendation, or imposition of discipline greater than or less than those listed herein, in the proper exercise of the Department's discretion.

We are satisfied that the ALJ in this case acted well within the discretion provided to him by Rule 144.

ORDER

The decision of the Department is affirmed.³

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.